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No. 80-1924

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CASPAR W. WEINBERGER, *et al.*, *Petitioners*,

v.

ANTHONY M. ROSSI, *et al.*, *Respondents*.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether the word "treaty" in Section 106 of Pub. L. No. 92-129, which prohibits employment discrimination against United States citizens on military bases overseas unless permitted by "treaty," encompasses all international agreements concluded by the President with the host country or is limited to treaties consented to by the Senate pursuant to article II, section 2 of the United States Constitution.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the parties to this case are petitioner John F. Lehman, Jr., Secretary of the Navy, and respondents Cindy L. Perry, Malinda Frierson, Fred E. Bumgarner, Camela Banks, Edna Horvath, Paul Chapman, Kenneth E. Oyler, James Vinson, A. H. Schilot, George Marshall, Herb Allen, Robert Wolbert, Rex W. Thomas, Elizabeth Taylor, Susan Keyes, Carroll E. Mason, Carlos F. Garcia, Clarence Labak, Richard Anderson, Beulah M. Jones, Pilar Galvin, Beverly Walker Pratt, Harold E. Shrader, Doris M. Chaisson, Karen S. Knapp, Patricia Procter, Gertrude A. Stevens, Arthur P. Fernandez, and Cynthia A. Roybal.

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IN THE

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OCTOBER TERM, 1981

No. 80-1924

CASPAR W. WEINBERGER, *et al.*, *Petitioners*,

v.

ANTHONY M. ROSSI, *et al.*, *Respondents*.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the Court of Appeals Appendix to Petition ("Pet. App." 1a-19a) is reported at 642 F.2d 553 (D.C. Cir. 1980). The opinion of the District Court (Pet. App. 20a-39a) is reported at 467 F.Supp. 960 (D.D.C. 1979). The decision of the administrative agency on the discrimination complaint by respondents (Pet. App. 41a-45a) is not reported.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 46a-47a) was entered on September 15, 1980, and a petition for rehearing was denied on December 18, 1980 (Pet. App. 48a-49a). On March 13, 1981, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 16, 1981, and the petition was filed on May 15, 1981. The Court granted the petition on October 5, 1981. The jurisdiction of the Court rests on 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 106 of Pub. L. No. 92-129, 85 Stat. 355, codified at 5 U.S.C. § 7201 note (Supp.III), provides:

> Unless prohibited by treaty, no person shall be discriminated against by the Department of Defense or by any officer or employee thereof, in the employment of civilian personnel at any facility or installation operated by the Department of Defense in any foreign country because such person is a citizen of the United States or is a dependent of a member of the Armed Forces of the United States. As used in this section, the term "facility or installation operated by the Department of Defense" shall include, but shall not be limited to, any officer's club, non-commissioned officers' club, post exchange, or commissary store.

STATEMENT

1. Each of the plaintiffs in this case is a U.S. citizen residing in the Philippines who sought to obtain or to keep a civilian job at U.S. military installations in the Philippines. Many plaintiffs applied for jobs and were summarily rejected because the jobs were reserved for local nationals. Other plaintiffs were deterred from applying for such jobs reserved for local nationals. Four plaintiffs, Rossi, Bumgarner, Frierson and Perry, actually held jobs at the Subic Bay Naval installation and were replaced by Filipinos when their jobs were converted.

2. Cross motions for summary judgment in the District Court led to the dismissal of Respondents' discrimination suit on the grounds that Section 106 of Pub. L. No. 92-129, 85 Stat. 355, codified at 5 U.S.C. § 7201 note (Supp. III) (referred to as the "Hughes-Schweiker Amendment") authorized employment discrimination against U.S. citizens and that it superseded Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.* Pet. App. 20a-39a. [1] Respondents (plaintiffs in the District Court) appealed the

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[1] The Complaint, included in the Court of Appeals Joint Appendix [hereinafter cited to as "A."], alleges violations of the Hughes-Schweiker Amendment as well as of Title VII. A. 1-11. Respondents relied upon language in *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 92 (1973) that "Title VII prohibits discrimination on the basis of citizenship *whenever it has the purpose or effect* of discriminating on the basis of national origin." (emph-

grant of summary judgment in favor of the United States Government. The Court of Appeals ruled that the term "treaty" in the Hughes-Schweiker Amendment should be construed to exclude executive agreements due to the plain meaning of the term "treaty" and the evidence of Congressional intent to abrogate inconsistent executive agreements. Pet. App. 1a-19a. [2] Respondents adopt the procedural history of the case stated by the Government. Pet. Brief at 7-11.

3. The question before this Court is whether the term "treaty" as used in this statutory prohibition of discrimination against U.S. citizens should be construed to include any "other international agreements." At the time the Hughes-Schweiker Amendment was enacted by Congress, twelve agreements provided for preferential treatment of local nationals in employment at U.S. overseas facilities. Pet. App. 13a. In addition, the NATO Status of Forces Agreement, 4 U.S.T. 1792, 1810, T.I.A.S. No. 2846 ("NATO SOFA") was construed to apply German labor laws (which the German Government contended required such preferences) to U.S. facilities in the Federal Republic of Germany. Pet. Brief at 6-7 n.5. [3] There were no instances

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asis added). *See* A. 29. The Department of the Navy (A. 230-232) rejected the administrative charge of discrimination since "the matters complained of in the instant class complaint are not under the control of the Department of the Navy [due to the Base Labor Agreement, Article I, para. 1]." A. 231. The District Court, in addition to ruling with the Government on the Hughes-Schweiker Amendment issue, held that "[t]he specific provision that the Department of Defense may discriminate on the basis of citizenship if provided by treaty therefore controls over the general provisions of Title VII." Appendix to Petition for Writ of Certiorari 37a-38a [hereinafter cited as Pet. App.]. *Cf. Avigliano* v. *Sumitomo Shoji America, Inc.*, 638 F.2d 552 (2d Cir.), *cert. granted*, Nos. 81-24 & 80-2070, 50 U.S.L.W. 3351 (Nov. 2, 1981) (raising the issue whether the United States-Japan Treaty of Friendship, Commerce and Navigation, 4 U.S.T. 2063, allowing Japanese companies operating in the United States to hire certain personnel "of their choice," should be given effect so as to limit the prohibition of Title VII against discrimination on the basis of national origin).

[2] The Court of Appeals did not address the Title VII issue due to its ruling on the Hughes-Schweiker question. Pet. App. 19a n.36, 642 F.2d at 561 n.36.

then in effect in which local national preferences existed outside the framework of a diplomatic arrangement of some sort. Pet. App. 12a-13a.

4. Some form of diplomatic arrangements for preferential treatment of local nationals still exists in several countries besides the Philippines. Pet. Brief at 5-6 nn. 3 & 4.

5. Congress has recently called upon the Executive Branch to "take every possible action including renegotiation of existing agreements if necessary in order to enhance the employment opportunities for U.S. citizens living in overseas areas." H.R. REP. NO. 97-410, 97th Cong., 1st Sess. 54 (1981), *reprinted in* 127 CONG. REC. H9575 (daily ed. Dec. 15, 1981).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the issue of whether the term "treaty" used in a statute prohibiting discrimination against U.S. citizens in overseas employment at U.S. bases can be loosely defined to include all forms of international agreement. The issue is simply one of statutory construction: did Congress intend narrowly to grant exceptions to this prohibition?

The Government concedes before this Court that the Executive Branch has acted in this area under a grant of authority from Congress. Petitioner's Brief at 27 n.16. Nowhere has the Government challenged the authority of Congress to enact legislation concerning the terms and conditions of employment at U.S. overseas bases. Such legislation obviously has domestic impact, contrary to Petitioners' unsupported assertions. Pet. Brief at 23.

The parties agree that Congress has exercised its constitutional authority, but differ over the meaning of the statute so enacted. The Court of Appeals unanimously adopted the view that the term "treaty" was used in its normal sense and was intended to abrogate inconsis-

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[3] However, the highest German labor court has recently concluded that Germans need not receive such a preference under German law. der Sechste Senat des Bundesarbeitsgerichts, BArbGE File No. 6 ABR 74/78 (July 23, 1981).

tent executive agreements which provided for discrimination against U.S. citizens. This Court should affirm Judge Wilkey's opinion written for a unanimous panel of the Court of Appeals.

The intent and purpose of Congress in enacting the Hughes-Schweiker Amendment was simple and clear. It was to provide "that the Department of Defense cannot discriminate against American citizens or their dependents in employment on military bases." S. REP. NO. 92-93, 92d Cong., 1st Sess. 23 (1971). The co-sponsor of the legislation referred to the classification of jobs as "local national jobs" which could not be filled by U.S. citizens and dependents "because of their classification." 117 CONG. REC. 16132 (1971) (remarks of Senator Schweiker quoting an article in *Stars & Stripes*). The other co-sponsor noted that:

> [wives of enlisted personnel] are denied the opportunity to work on overseas bases, *by agreement with the countries in which they are located,* and are forced to live in poverty. 117 CONG. REC. 16126 (1971) (remarks of Senator Hughes) (emphasis added).

The sole means of classifying jobs as "local national" was at that time and remains executive agreements such as those referred to by Senator Hughes. The Government's explanation of this legislative history is circular and would defeat the Congressional purpose expressed at the time of passage.

The term "treaty" has consistently been used in the constitutional sense by the 92d Congress in the Case Act, 1 U.S.C. § 112b, and other measures; by Congress in numerous other statutes; by the administrative agencies (Department of State and Defense) in this and other contexts; and by international experts in this field. *See* RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 302 (Tent. Draft April 1, 1980). The Court of Appeals correctly noted that "under United States law, 'treaties' normally are thought of as one specific category of international agreements requiring a particular procedure and having a particular status." Pet. App. 7a, 692 F.2d at 557.

It is not disputed here that Congress has the authority to direct "whether United States citizens would be discriminated against in the employment of civilian personnel on overseas military bases." Pet.

App. 18a, 642 F.2d at 561. *See Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 381 (1948), *rehearing denied*, 336 U.S. 928 (1949); Pet. Brief at 27 n.16. It is similarly clear that when Congress exercises its legislative prerogative inconsistent executive agreements are abrogated even if such a result is inadvertent. *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620-21 (1871) and cases cited herein. The State Department has noted consistently that it is "perfectly clear that, in an area of shared Presidential and Congressional powers, subsequent legislation would override an executive agreement. . . ." *Congressional Oversight of Executive Agreements: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. 288-89 (1972) (Statement of John R. Stevenson, Legal Advisor, Dep't of State).

Foreign policy allegations made by the Government before this Court are thus irrelevant, since the Government concedes Congressional authority to act in this area. Moreover, not only is there an absence of a factual basis in the record for such allegations, but after extensive oversight, Congress seems to have rejected these same arguments. *See* H.R. REP. NO. 97-410, 97th Cong., 1st Sess. 54 (1981), *reprinted in* 127 CONG. REC. H9575 (daily ed. Dec. 15, 1981). In raising these allegations, the Executive Branch seems to be attempting to draw this Court into a debate it has repeatedly lost in Congress. Finally, any arrangements deemed critical to national security could continue under the Court of Appeals decision as long as they were approved by the Senate.

Congress enacted the Hughes-Schweiker Amendment "to correct a situation [in which] . . . dependents are effectively prevented from obtaining employment [at U.S. bases overseas]." H.R. REP. NO. 92-433, 92d Cong., 1st Sess. 31 (1971). Since 1971, the situation has never been corrected, despite the intent and subsequent pronouncements of Congress, the opinion of the U.S. General Accounting Office that these agreements were unlawful and the opinion of the State Department until 1977 that these arrangements contravened the intent of the Hughes-Schweiker Amendment. This Court can finally correct the situation. A ruling which affirms the Court of Appeals decision would have major beneficial effects on thousands of military families who have endured the increasing hardship of overseas tours,

unable to add to their family income by employment at these U.S. facilities. Such a ruling would finally vindicate the policy of Congress announced ten years ago and reiterated in December of 1981.

ARGUMENT

I. Congressional Purpose Can Only Be Realized By Construing "Treaty" In The Sense That The Term Is Used In The United States Constitution.

The Court of Appeals for the District of Columbia Circuit concluded below that "*consistent with this purpose* [of eliminating discrimination against American citizens], *Congress could only have intended the 'treaty' exception to include an agreement made by the President with the advice and consent of two-thirds of the Senate.*"[4] Support for this conclusion comes from the Congressional purpose expressed at the time of enactment of Section 106, from the contemporary expression of legislative intent, from the use of "treaty" in contemporaneous legislation, and from subsequent declarations of Congressional policy. Only by constructing an elaborate and pretextual chain of reasoning has the Government devised support for a contrary interpretation. Such an interpretation, if adopted by the Court, would frustrate the clearly expressed policy of Congress to eliminate discrimination against American citizens.

A. *Expansion Of The Term "Treaty" To Include Any International Agreement Would Frustrate The Purpose Of The Hughes-Schweiker Amendment.*

The doctrine that "courts will construe the details of an act in conformity with its dominating general purpose" has been clearly established by this Court and is a central canon of statutory construction. *SEC* v. *Joiner Corps*, 320 U.S. 344, 350-51 (1943).[5] Simply

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[4] Pet. App. 15a, 642 F.2d at 560 (emphasis in original).

[5] *See Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979); *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975); *Kokoszka* v. *Belford*, 417 U.S. 642, 650 (1974); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410-13 (1971); *Boys Market, Inc.* v. *Retail Clerks Union*, 398 U.S. 235, 250 (1970); *United States* v. *Speers*, 382 U.S. 266,

put, "[s]tatutes should be so construed as to carry out the legislative purpose." *St. Louis and O'Fallon Railway Co.* v. *United States*, 279 U.S. 461, 484 (1929). The legislative purpose of the Hughes-Schweiker Amendment, as stated in the Senate Report, is quite clear: to establish that "the Department of Defense cannot discriminate against American citizens or their dependents in employment on military bases."[6] The Conference Committee Report echoed this general remedial purpose:

> The purpose of the Senate provision is to correct a situation which exists at some foreign bases, primarily in Europe, *where discrimination in favor of local nationals and against American dependents in employment has contributed to conditions of hardship for families of American enlisted men* whose dependents are effectively prevented from obtaining employment. The House accepts the Senate provision.[7]

While there is no doubt as to the situation which Congress sought to correct, there is also no doubt that that situation — the preferential hiring of local nationals at the expense of American citizens — existed at the time of enactment of this provision by virtue of executive agreements between the United States and foreign

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271-75 (1965), *Pennsylvania R.R. Co.* v. *Rychlik*, 352 U.S. 480, 488 (1957); *National Petroleum Refiners Ass'n* v. *FTC*, 482 F.2d 672, 689 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). "In the absence of an unmistakable directive, the Court has refused to construe legislation aimed to protect a certain class in a fashion that will run counter to the goals Congress clearly intended to effectuate." *NLRB* v. *Plasterers' Union Local*, 404 U.S. 116, 130 (1971).

[6] S. REP. NO. 92-93, 92d Cong., 1st Sess. 23 (1971). An "unmistakable" purpose articulated in congressional reports is "of controlling importance in construing . . . statutory changes. *Commissioner* v. *Bilder*, 369 U.S. 499, 503-04 (1962). *See, e.g., Flora* v. *United States*, 357 U.S. 63, 73-75 (1958); *Benz* v. *Compania Naveria Hidalgo, S.A.*, 353 U.S. 138, 143-44 (1957); *NLRB* v. *Lion Oil Co.*, 352 U.S. 282, 292 (1957); *United States* v. *Flores*, 289 U.S. 137, 157 (1933); *William Cramp & Sons Ship & Engine Bldg. Co.* v. *International Curtis Marine Turbine Co.*, 246 U.S. 28, 37-39 (1918); *Binns* v. *United States*, 194 U.S. 486, 495 (1904).

[7] H.R. REP. NO. 92-433, 92d Cong., 1st Sess. 31 (1971) (emphasis added).

governments.[8] If Section 106 is construed so as to include executive agreements within the "treaty" exception of the provision, then clearly the provision would be rendered a nullity.[9] The Government, however, proposes just this result by suggesting that the purpose of the Hughes-Schweiker Amendment was simply "to prevent future actions by individual Department of Defense commanders. . . ."[10] The Court of Appeals rejected this argument for several reasons: (a) the legislative history contains reference to only a single incident of an individual commander encouraging the hiring of local nationals;[11]

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[8] The Court of Appeals noted that "twelve international agreements were in effect providing for preferential hiring of local nationals on United States military bases." Pet. App. 13a, 642 F.2d at 559. In addition, under the NATO Status of Forces Agreement, 4 U.S.T. 1792, 1810, T.I.A.S. No. 2846, "*the U.S. Forces have historically designated certain positions to be filled by local labor.*" Letter from Carl W. Clewlow, Deputy Asst. Sec. of Defense for Civilian Personnel Policy, to George H. Mahon, Chairman of House Comm. on Appropriations (April 23, 1978), included as Attachment One to Plaintiffs' Opposition to Defendant's Motion for Partial Summary Judgment, referenced at App. 93 n.11, (emphasis added). In 1971, the DOD policy then in effect called for limited hiring of dependents "consistent with status of forces agreements, country-to-country agreements and treaties. . . ." DOD Circular, March 6, 1961, cited in A.202. As of 1978, the United States Government objected to the German Government's interpretation of SOFA, Article IX, as requiring a preference for local nationals *(Id.)*. Contrary to the Government's position in its brief, at 7 n. 5, the highest German labor court ruled on July 23, 1981 that applicable German labor laws *did not require preferential treatment of German workers at U.S. facilities*. der Sechste Senat des Bundersarbeitsgerichts, BArbGE, File No. 6 ABR 74/78 (July 23, 1981).

[9] Such an interpretation would totally frustrate the purpose of Congress and violate the most basic tenets of statutory construction. *See* cases cited in note 5 *supra*.

[10] Brief of Petitioners at 40 [hereinafter cited as Pet. Brief]. *See also*, District Court decision, Pet. App. 32a, 467 F.Supp. at 967 n.4.

[11] Pet. App. 12a, 642 F.2d at 558-59. The incidence in question did *not* involve classification of jobs as exclusively "local national," a practice which had been occuring under an erroneous view of the NATO SOFA *not due* to individual commanders' action. *See* note 8 *supra*.

(b) that incident was represented to Congress as having been mooted by the actions of the Department of the Army designed to correct the commander's order;[12] and (c) all on-going discrimination against American citizens was being conducted under international agreements.[13] The Court of Appeals concluded "that [the Government's contention] is *a constrained and erroneous view of congressional intent*."[14] The overriding purpose of Congress was obviously to help to alleviate the hardship of overseas tours of U.S. military personnel by increasing the employment opportunities for military dependents insofar as those opportunities were under U.S. control.[15]

The construction of Section 106 urged upon the Court by the Government would exempt from the proscription against discrimination *every* case of discrimination occurring at the time the legislation was passed. As Judge Wilkey observed in the Court of Appeals opinion, under the Government's view, "the exception to the ban on

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[12] Pet. App. 12a, 642 F.2d at 559.

[13] *Id.* 13a, 642 F.2d at 559.

[14] *Id.* 12a, 642 F.2d at 559.

[15] Jobs in local foreign economies would require work visas, which had been unavailable to U.S. dependents and which could not be unilaterally obtained by the United States. 117 CONG. REC. 16126 (1971) (remarks of Senators Cook and Hughes). Congress recognized that many jobs on U.S. bases, supported by American funding, were classified as "local national" and directed its attention to the portion of the problem it could solve. 117 CONG. REC. 16132 (1971) (remarks of Senator Schweiker reading article into the record). It was the opening of these jobs that Congress sought to effectuate by enacting the bill.

Senator Schweiker felt that a "simple Executive order" could change this. *Id.* While the Government contends that this fails to show an intent to abrogate international agreements given their internationally binding effect, Pet. Brief at 37, the Government has asserted elsewhere that "the President [even] has broad constitutional authority to terminate the Nation's treaty obligations, without seeking approval or acquiescence from Congress." Brief of Respondents in Opposition at 8, *Goldwater* v. *Carter*, 444 U.S. 996 (1979). (The Government there referred to "treaty" in its normal constitutional sense.)

discrimination virtually would engulf the general rule." [16] The Government is asking the Court to breach the Court's own admonition that "respect for the policy of Congress must save us from imputing to it a self-defeating, if not disingenuous purpose." *Nardone* v. *United States*, 308 U.S. 338, 341 (1939). *See Dalia* v. *United States*, 441 U.S. 238, 254 (1979). [17]

To alleviate the condition of hardship of U.S. citizens and dependents overseas, the term "treaty" must be viewed in its constitutional sense; otherwise, all of the practices affirmatively condemned by Congress will be allowed to continue without redress.

B. *By Enacting The Hughes-Schweiker Amendment, Congress Specifically Intended To Abrogate Existing Executive Agreements.*

While the Court of Appeals found a clear expression of Congressional intent to abrogate inconsistent executive agreements (Pet. App. 15a), the Government's argument on Congressional intent is without substantial authority. The Government makes much of the notion that intent to abrogate international agreements should be "clearly expressed." [18] The Government does not, however, analyze any authority with respect to what this Court has considered a "clear expression" of such intent. [19] In fact, the evidence of legislative intent

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[16] Pet. App. 18a, 642 F.2d at 561. "[A] statutory exception should be strictly construed so that the exception does not devour the general policy which the law embodies." *State of Utah* v. *Kleppe*, 586 F.2d 756, 769 (10th Cir. 1978).

[17] As this Court has noted elsewhere, "[w]e do not believe that Congress had in mind such a self-defeating scheme." *United States* v. *American Union Transport, Inc.*, 327 U.S. 437, 451 (1946). *See USV Pharmaceutical Corp.* v. *Weinberger*, 412 U.S. 655, 665 (1973); *United States* v. *Shirey*, 359 U.S. 255, 260 (1959).

[18] Pet. Brief at 25-26.

[19] The seminal case for the Government's concept, *Cook* v. *United States*, 288 U.S. 102 (1933), involved a series of legislative and executive tariff actions. The first act passed in 1922 was followed by a treaty in 1924 and a re-enactment of the 1922 act in 1930. *Id.* at 109-112. This Court held that the treaty *superseded* the 1922 act (*Id.* 118-119) although the treaty did not even

held sufficient by this Court to negate even *treaty* obligations has been a far less clear than that which is available in this case.[20] The Government also misconstrues the relative weight to be given to statutes and executive agreements. A noted commentator states: "that the executive agreement must yield to an act of Congress is the uniform practice."[21] The Department of State's Legal Advisor has concurred that subsequent legislation may override an executive agreement.[22] The Government's contention that the same rule gov-

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refer to the act and the Government argued there that it did not repeal the act. This Court went on to hold that re-enactment of the provisions in 1930 did not restore the earlier rule without an expression of clear intent. In *Moser* v. *United States*, 341 U.S. 41, 45-46 (1951), this Court simply held that the treaty and statute involved could both be given effect without violence to the treaty obligations, finding that Congress could bar from obtaining U.S. citizenship Swiss citizens who claimed a draft exemption under a treaty providing for same. *Id.* at 45. *Accord, Clark* v. *Allen*, 331 U.S. 503, 510-11 (1947) (not only finding compatibility between the treaty in question and the statute, but noting a "tacit recognition" of the treaty's subject matter by the statute); *United States* v. *Payne*, 264 U.S. 446, 447-449 (1924) (harmonizing a general statutory provision with a specific Indian treaty by holding that statutory allotments of land for "agricultural or grazing purposes" included timbered land granted under a treaty because the statute referred to payments "to clear" land for cultivation); *Chew Heong* v. *United States*, 112 U.S. 536, 553 (1884) (finding "evidence of the most cogent nature of the intention of Congress not to disregard that treaty" within the legislation itself).

[20] *See* note 97 *infra* and accompanying text.

[21] Brochard, *Treaties and Executive Agreements — A Reply*, 54 YALE L.J. 616, 623 (1945).

[22] It is "perfectly clear that, in an area of shared Presidential and Congressional powers, subsequent legislation would override an executive agreement." *Congressional Oversight of Executive Agreements: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. 288-89 (1972) (statement of John R. Stevenson, Legal Advisor, Dep't of State) [hereinafter cited as Stevenson Statement]. *Accord*, A. Rovine, (Assistant Legal Advisor for Treaty Affairs, Dep't of State), *Separation of Powers and International Executive Agreements*, 52 IND. L.J. 397, 421 (1977). In the case of a treaty and a statute, "[s]ince both are the work of Congress there is less doctrinal difficulty in insisting that the later repeals the earlier. . . ." HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 163 (1975).

erning "repeals by implication" of statutes should apply to executive agreements is also without any substantive authority and is inapplicable here. [23]

In any event, the legislative history contains unmistakable evidence of the "clear expression" of intent to abrogate these agreements. Senator Schweiker, a co-sponsor of the Senate bill, read a lengthy article from the military publication *Stars & Stripes* into the record which clearly identified the problem to be corrected and leaves no doubt as to its cause:

> Most civilian jobs on U.S. installations in Europe are held by local nationals or by persons from another European country. *These jobs are classified as local national jobs and American dependents cannot fill the jobs because of their classification.* [24]

In addition, Congress specifically referred to executive agreements as the source of the problem to be corrected. Senator Hughes, the other co-sponsor of the bill, noted during the Senate floor debate on passage of the measure:

> [Dependents of enlisted personnel] are denied the opportunity to work on overseas bases, *by agreement with the countries in which they are located,* and are forced to live in poverty. [25]

Judge Wilkey and a unanimous Court of Appeals found this statement to be an unmistakable indication that Congress intended to abrogate those portions of the existing executive agreements providing for preferential hiring of local nationals. [26] Since the only system for

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[23] Pet. Brief at 26-27 & n.16.

[24] 117 CONG. REC. 16132 (1971) (emphasis added).

[25] 117 CONG. REC. 16126 (1971).

[26] Pet. App. 14a, 642 F.2d at 560. Statements of the sponsors of legislation should be given great weight in ascertaining the intent of Congress. *Pipefitters Local 562* v. *United States*, 407 U.S. 385, 409 (1972); *NLRB* v. *Fruit & Vegetable Packers and Warehousemen Local 760*, 377 U.S. 58, 66 (1964); *Gold Kist, Inc.* v. *United States*, 339 F. Supp. 1249, 1253 (N.D. Ga. 1971) (three judge court), *aff'd*, 409 U.S. 808 (1972). Although the references to international agreements in the legislative history are not extensive (Pet. App. 14a), they are "the final and only word on the subject." *Gold Kist, Inc.* v. *United States*, 339 F. Supp. at 1253. *See also City of New York* v.

classification of jobs as "local national" occurred under the various executive agreements, it is inconceivable that Senator Schweiker could have been referring to anything else.[27] The article read into the record by Senator Schweiker argued that "[p]ortions of SOFA could and should be changed to allow dependent wives to take many of the jobs now available solely to local nationals. . . ."[28]

The Government's principal rebuttal to the reasoning of the Court of Appeals is completely inapposite:

> it may be that Senator Hughes failed to appreciate that while work permit visas are required of United States dependents who work in the local economies of host nations, such visas are not required of United States citizens who are employed on United States military bases overseas. Therefore, his remarks about "agreements" may erroneously have referred to provisions concerning the visa status of American military dependents rather than to employment preference agreements such as the BLA.[29]

The Government hypothesizes that Senator Hughes was referring to agreements concerning visas and then goes on to point out that

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Train, 161 U.S. App. D.C. 114, 494 F.2d 1033, 1039 (1974), *aff'd*, 420 U.S. 35 (1975) (relying on selected comments by sponsors in a 1700 page legislative history).

[27] The memorandum by General Phipps, 117 CONG. REC. 14395-97 (1971), was directed solely at slowing down *recruitment* of U.S. dependents and tourists. *Id.* at 14395. The only *classification* of jobs as local national was occurring under an erroneous interpretation of SOFA or under other agreements such as the BLA. *See* note 8 *supra*.

[28] 117 CONG REC. 16128 (1971). The Government cites Senator Schweiker's interjection, after he read this passage, "that is not the case" for the proposition that the statement cited in the article was incorrect. Pet. Brief at 37. In fact, the interjection was to the effect that *the greater utilization of dependents called for by the article was not occurring* and was even being frustrated further by individual commanders. It was entirely accurate to say that SOFA was causing discrimination against American citizens, (*see* note 8 *supra)* and to ascribe some faulty understanding of this fact to Senator Schweiker would indeed be "disingenuous." *See Nardone* v. *United States*, 308 U.S. 338, 341 (1939); note 8 *supra*.

[29] Pet. Brief at 40.

civilian employment on U.S. bases is not affected by visas. This circular logic needlessly confuses the Court's consideration of the legislative history and clearly ignores the central conclusion to be gained from the record: *preferential hiring has existed as a result of the classification of certain base jobs as "local national" under executive agreements. Congress referred to such classifications and agreements in legislation prohibiting discrimination against American citizens.*

C. *Congress Used The Term "Treaty" In The Same Sense As In Other Contemporaneous Legislation.*

Implicit in the Government's contention that "treaty" in Section 106 should include executive agreements is the conclusion that Congress did not appreciate the difference between "treaty" and "executive agreement" and was unable to articulate the crucial distinction between the two. Contemporaneous expressions by the very Congress that enacted Section 106 reveal the Government's position to be untenable.

The Court of Appeals noted below that:

> legislation enacted contemporaneously with Section 106 supports our conclusion that Congress intended a clear distinction between treaties requiring the ratification of the Senate and other forms of international agreements. [30]

This Court has observed that "a legislative body generally uses a particular word with a consistent meaning in a given context." *Erlenbaugh* v. *United States*, 409 U.S. 239, 243 (1971). The use of a word by Congress in another statute during the same period significantly "aids in ascertaining the meaning of the words as used in their contemporary setting." *United States* v. *Stewart*, 311 U.S. 60, 64-65 (1940).

In addition, the general context in which a piece of legislation is passed — in terms of the overall sense of the Congress — is also of great value in interpreting legislation. As this Court stated in *Standard Oil* v. *United States*, 221 U.S. 1, 59 (1911),

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[30] Pet. App. 16a, 642 F.2d at 560.

> [W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense unless the context compels to the contrary. [31]

The context in which Congress viewed discrimination against U.S. citizens pursuant to executive agreements in the early 1970s was one of marked tension between the Executive and Legislative Branches. One writer observed:

> The past few years have witnessed an intense and profoundly important debate between the Congress and the executive branch on the subject of international executive agreements. Separation of power issues have abounded as the Congress, in a mood strongly reminiscent of the Bricker Amendment conflict of the 1950's, has attempted to gain a greater measure of control over the executive branch capacity to conclude international agreements. [32]

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[31] *Accord, Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 759-61 (1980) (holding "costs" as used in 28 U.S.C. § 1927 (1976) limited to contemporaneous view of "costs" in 28 U.S.C. § 1920 (1976 & Supp. II 1978)); *Agosto* v. *Immigration and Naturalization Service*, 436 U.S. 748, 754 (1978) (holding that 8 U.S.C. § 1105a (5)(1976) incorporated Fed. standard of "genuine issue of material fact"); *Lorillard* v. *Pons*, 434 U.S. 575, 583 (1978) (holding that the word "legal" in 29 U.S.C. § 626(b)(1976) incorporated a term of art entitling plaintiff to trial by jury); *Perrin* v. *United States*, 444 U.S. 37, 42 (1979) ("unless otherwise defined, words will be interpreted as taking their ordinary *contemporary*, common meaning") (emphasis added); *Gilbert* v. *United States*, 370 U.S. 650, 655-57 (1962) (holding that 18 U.S.C. § 495 uses the term "forges" in the common law sense established in this country, not in a broader sense originally expounded by the English Parliament).

[32] Rovine, *supra* note 22, at 397. *See* Murphy, *Treaties and International Agreements Other Than Treaties: Constitutional Allocation of Power and Responsibility Among the President, the House of Representatives and the Senate*, 23 KAN. L. REV. 221 (1975). In 1970, Senator Fulbright referred to the "shabby use of the treaty making process" in reporting on his committee's work. 116 CONG. REC. 44016 (1970). *See, e.g.*, National Commitments Resolution, S.85, 91st Cong., 2d Sess., 115 CONG. REC. 17245 (1969) (referring to "affirmative action . . . by means of a treaty, statute, or government resolution of both Houses of Congress").

This debate focused particularly on the use of executive agreements in lieu of treaties:

> The viewpoint of the congressional sponsors of the measures, as expressed in the bills and in Congressional hearings, has been that the executive branch has wrongfully abridged the role of the Congress by concluding, in the place of treaties or other congressionally approved agreements, international executive agreements which, in the majority of cases, are not submitted to Congress for approval. [33]

The 92d Congress enacted legislation aimed at rectifying this circumvention of Congressional involvement in international affairs. The Case Act, 1 U.S.C. § 112b (1976), [34] expressed a major concern of the Congress over the use of executive agreements in lieu of treaties. The House Report on the bill noted that "Congress has not always been kept adequately informed about the international executive agreements entered into by the President. . . ." [35] The Case Act required the Executive Branch to "transmit to the Congress the text of any international agreement. . ., *other than a treaty*, to which the United States is a party. . . ." 1 U.S.C. § 112b (emphasis added).

Thus, the passage of the Case Act demonstrates beyond question that the 92d Congress was fully aware that the limited scope of the term "treaty" did not and does not encompass other international agreements and that the 92d Congress intended, as a general matter,

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[33] Rovine, *supra* note 22 at 398. Senator Ervin, for instance, observed in 1972: "I think executive agreements too often are used to circumvent the treaty making process, and they constitute in legal effect, a usurpation of the legislative power of Congress." *Congressional Oversight of Executive Agreements: Hearings Before the Subcomm. on Separation of Powers, of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. 47 (1972). *See also* Testimony of Prof. Alexander Bickel, Yale University Law School, before the Senate Comm. on Foreign Relations, *quoted in* S. REP. NO. 92-591, 92d Cong., 2d Sess. 2 (1972).

[34] Act of Aug. 22, 1972, Pub. L. No. 92-403, § 1, 86 Stat. 619, as amended.

[35] H.R. REP NO. 92-1301, 92d Cong., 2d Sess. 2 (1972). *See* House debate on passage, 118 CONG. REC. 28085-87 (1972).

to enact legislation which would effectively regain ground that had previously been unwittingly rendered to the Executive.

The State Department originally relied upon passage of the Case Act by the 92d Congress to support the view that the Hughes-Schweider Amendment was limited to treaties approved by the Senate. In 1975, the State Department noted:

> In the key and most recently enacted statute bearing on this subject . . . the Congress clearly marks the distinction between treaty and other international agreements. . . .[36]

The U.S. General Accounting Office has adopted this view as well.[37] The Court of Appeals below agreed that the Case Act's distinction between treaties and other international agreements should be given serious consideration in construing the meaning of Section 106:

> Although the general subject matter treated in the two enactments is not the same, Congress used precisely the same word in both, suggesting at least that if Congress had intended a more expansive scope for the exception to the ban on discrimination in section 106, it easily could have chosen the term "international agreement" rather than the word "treaty." Moreover we think a similar concern may have been present in both statutes. As a check on the President's power, Congress, in the Case Act, sought to ensure that the legislative branch received timely notice of all international agreements. By enacting section 106, we think that Congress also wanted to exercise some control over whether United States citizens would be discriminated against in the employment of civilian personnel on overseas military bases. We recognize that the usage in contemporaneous legislation is not dispositive in this case; still, we think it weighs in favor of the view that Congress also intended the term "treaty" in section 106 to mean an agreement made by the President with the advice and consent of two-thirds of the Senate.[38]

The contemporaneous distinction between treaties and other international agreements does not end with the passage of the Case Act. Senate Resolution 214 expressed the intent of the Senate of the 92d

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[36] A. 223.

[37] A. 205.

[38] Pet. App. 17a-18a, 642 F. 2d at 561 (footnotes omitted).

Congress that then-pending agreements with Portugal and Bahrain for "military bases and foreign assistance should be submitted as a treaty to the Senate for advice and consent." [39] The rationale for this resolution is directly relevant to the question of whether the 92d Congress held executive agreements to be sacrosanct or, rather, to be within the reach of legislative review and modification: "the character of the agreements and their broad policy implications are too important to be left to unilateral action by the executive branch." [40] The distinction between treaties and other international agreements was at the heart of this rationale.

Senator Harry F. Byrd, Jr., whose testimony was quoted in the Senate Report on the resolution, noted:

> The issue, as I understand it, is where should the line be drawn as to whether agreements with foreign nations should be by executive agreement, which does not require Senate action, or by treaty which does not require Senate approval. [41]

The Senate's efforts to require the submission of pending military base agreements as treaties was "[a]n attempt to exert some check on the President's power. . . ." [42] At the same time that Congress was considering the Hughes-Schweiker Amendment, Professor Alexan-

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[39] 118 CONG. REC. 6870 (1972). An earlier resolution on the Spanish Bases Agreement of 1970 made a similar distinction. *Hearings on Spanish Bases Agreements Before the Senate Comm. on Foreign Relations*, 91st Cong., 2d Sess. 54, 57 (1970).

[40] S. REP. No. 92-632, 92d Cong., 2d Sess. 1 (1972).

[41] *Id.* at 4.

[42] Court of Appeals decision, Pet. App. 17a n.35, 642 F.2d at 561 n.35. *See generally Hearings on S. Res. 214, Before the Senate Comm. on Foreign Relations*, 92d Cong., 2d Sess. (1972). Senator Ervin noted in hearings during this period: "During the past few decades, the executive branch has found irresistable the temptation to dispose of what it considered routine matters through the shortest method of entering into executive agreements, rather than making formal treaties. . . ." *Congressional Oversight of Executive Agreements: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. 3 (1972).

der M. Bickel testified that base agreements were in a "twilight zone" that:

> may be occupied by Congress at will; that is the significance of it. It exists, and independent Presidential power can exist within it, only by Congress leave, or because of the inertia of Congress. It is redefined or it vanishes whenever Congress chooses to act. [43]

The reassertion of Congressional authority by the 92d Congress focused in large measure on the re-establishment of the constitutional role of "treaties." Neither the Case Act nor Senate Resolution 214 specifically defined "treaty" because the Congress did not feel any need to reiterate the well-known meaning of the term. [44] It is clear, given the context, that in Section 106 the 92d Congress was using "treaty" in its narrow constitutional sense. There is no reason to believe that the term "treaty" would have been accorded a wholly different meaning without explanation in other legislative actions of the same Congress. [45] This is especially true where that unique meaning would delegate to the Executive Branch the unilateral discretion to grant exemptions from the Congressional policy of non-discrimination against American citizens in base employment.

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[43] *Transmittal of Executive Agreements to Congress: Hearings on S.596 Before the Senate Foreign Relations Comm.*, 92d Cong., 1st Sess. 27 (1971) (testimony of Prof. Alexander M. Bickel).

[44] *But see* Pet. Brief at 21. Words with a normal plain meaning or well-known terms of art are seldom defined by legislation. *See* section II *infra*. That the 92d Congress, which undisputedly used the term in the normal and Constitutional sense in the Case Act and Senate Resolution 214, would have silently departed from this meaning is the more unlikely contention.

[45] Justice Jackson once commented, "neither should we embark upon a course of making the same naked words mean one thing in one Act and something else in another." *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 399 (1948) (Jackson, J., dissenting).

D. *Subsequent Congressional Directives Have Reiterated The Call For Cessation Of Preferential Hiring Of Local Nationals*

When the Government suggests that Congress has acquiesced in an interpretation of the Hughes-Schweiker Amendment which essentially nullifies the statute's effect, [46] it does great violence to the actual record of Congressional pronouncements. The legislative materials cited by the Government fail to show acquiescence by silence or by any other action. [47] Moreover, the Government's materials omit several key Congressional actions which condemn the practice of preferential hiring of local nationals.

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[46] Pet. Brief at 40.

[47] Materials cited by the Government indicating Congressional awareness of preferential hiring since 1971 actually demonstrate that Congress has not acquiesced to the practice: Congress has "questioned" the practice since 1971 and has "resisted the exercise of presidential authority." *See Dames & Moore* v. *Regan*, 49 U.S.L.W. 4969, 4978 (1981). H.R. REP. No. 95-1398, cited by the Government, noted that: "Over the years, the Committee has been urging the Department of Defense to employ more DOD dependents in jobs currently held by foreign nationals when these positions become vacant." *Id.* at 80. The conclusion of the report was to "urge" DOD to continue converting foreign national positions. *Id.* at 81. The 1978 appropriations hearings in the Senate mentioned the use of local nationals in Korea (Pet. Brief at 43), but Korea is not listed by the Government as a country subject to such an agreement (Pet. Brief at 5-6 nn. 3&4.) Finally, Mr. Stevenson's testimony before Senator Ervin's subcommittee, cited by the Government at page 43 of the Brief, dealt solely with base agreements with Spain, Bahrain and the Azores, none of which involved preferential hiring of local nationals at the time of the hearings (1972). *See* Stevenson Statement, *supra* note 22, at 256. The testimony addressed the discretion of the Executive to conclude base agreements via the use of executive agreements in lieu of treaties. The Government consistently confuses this issue with the one presented by this case: did Congress direct the use of treaties as the sole means of imposing local national preferences? If anything, the 1972 hearings point to the acknowledged distinction between the two forms of international agreement.

Contrary to any purported silent acquiescence, the House Committee on Appropriations in 1977 made a lengthy statement [48] on preferential hiring of local nationals which referred to the 1971 statute, to the Philippines Base Labor Agreement and to the General Accounting Office opinion on the unlawfulness of the BLA, and concluded:

> The Committee believes that the Department of Defense should *review* all of the agreements and attempt to *renegotiate* those which provide little or no flexibility to the military service to

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[48] "In some countries the Department has entered into base labor agreements or has at the insistence of the Department of State provided preferential treatment for foreign national citizens. The General Accounting Office holds the legal opinion that the base labor agreements with the Philippines is in violation of a 1971 statute (Section 106 of Public Law 92-129) which prohibits discrimination in employment by the Department of Defense against United States citizens or dependents of members of the armed forces unless otherwise provided by treaty. The Department of Defense contends that the base labor agreement is a "treaty" within the meaning of that term as it is used in the 1971 statute, even though it has not been ratified by the United States Senate. The Department cites a 1912 Supreme Court Decision that indicated as a matter of statutory interpretation, the word "treaty" in a statute, unless there is legislative history to the contrary, includes "treaty" in the broad sense, to include executive agreements which do not have to be ratified by the Senate.

"Until recently the State Department held a position similar to GAO's but now agrees with the Department of Defense interpretation. There are no pending law suits to test the validity of DOD's interpretation at the present time.

"The situation in the Philippines is cited as an example of the problem. While it is quite clear that employing Philippine citizens is less costly than employing United States citizens in nearly all situations it does cause problems. For example, U.S. dependent children cannot be employed in their own teen clubs and other non-appropriated fund activities or hold part-time jobs of any kind. This causes morale problems.

"In another instance, one of the services has told the Committee that they would like to release a number of no-longer required employees in one particular country but the Department of Defense has been required to keep them on the payrolls. Also, many of the positions are designated (in the position descriptions) to be filled by a foreign national even though there is no reason for the special designation. When a job so designated becomes

> employ the type of labor which it believes to be lowest in cost, most efficient, or *necessary for the welfare and morale of its personnel*.[49]

The Committee also sought to be advised regularly on progress of this matter.[50] On April 23, 1978, the Deputy Assistant Secretary of Defense informed the Committee that "country-to-country agreements do not present a significant problem in obtaining flexibility desired."[51] Later, the Department of Defense took a position that the Base Labor Agreement for the Philippines would be reconsidered during then-pending base negotiations, and stated that "the finalized treaty" would be submitted to the Senate.[52] Again, it appears that while the Executive has sought to mislead or somehow appease Congress in order to induce Congressional acquiescence, that acquiescence has never been forthcoming.

The legislative history of the most recent military appropriations bill firmly reiterated the Congressional policy against preferential hiring of local nationals. The Conference Committee Report stated unequivocally:

> The DOD should take every possible action including renegotiation of existing agreements, if necessary, in order to enhance the

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available the personnel offices attempt to fill the position with a foreign national although no particular reason can be cited for this preferential treatment.

"The Committee believes that the Department of Defense should review all of these agreements and attempt to renegotiate those which provide little or no flexibility to the military service to employ the type of labor which it believes to be lowest in cost, most efficient, or necessary for the welfare and morale of its personnel.

"The Committee expects to be advised from time to time of progress in this area." H.R. REP. No. 95-68, 95th Cong., 1st Sess. 25 (1977).

[49] *Id.* (emphasis added).

[50] *Id.*

[51] Letter from Carl W. Clewlow, *supra* note 8. The basis for this misleading statement is unknown.

[52] Brief in Opposition to Petition for Writ of Certiorari, *Weinberger* v. *Rossi*, Appendix B, at 3a.

> employment opportunities for U.S. citizens living in overseas areas. [53]

Far from concurring in the Executive Branch's unilateral practice of discriminating against Americans overseas, Congress again expressed its policy of ending all such arrangements. [54]

The actions of the Appropriations Committee as expressions of Congressional policy should be viewed in the broader context of the struggle between the two branches. In efforts to defeat legislation which would provide an express legislative veto of executive agreements by either House of Congress, a State Department official noted the viability of existing means of Congressional participation:

> Clearly agreements within the competence of the Congress may be appropriately invalidated by a subsequent statute or by joint resolution. In addition, the power of the purse enables Congress to refuse funding for any executive agreement; this protection is very real since almost all significant agreements require funding. [55]

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[53] H.R. REP. NO. 97-410, 97th Cong., 1st Sess. 54 (1981), *reprinted in* 127 CONG. REC. 9575 (daily ed. Dec. 15, 1981).

[54] The contrast to the facts in *Dames & Moore* v. *Regan*, 49 U.S.L.W. 4969 (1981) relied upon by the Government, is striking. In *Dames & Moore*, the authority of the executive branch to settle foreign claims of Americans was undisputed. This Court pointed to a statutory scheme designed to implement just such settlements (*Id.* at 4976), and to congressional pronouncements approving of and preserving the authority of the President. *Id. Compare* S. REP. NO. 97-71, 97th Cong., 1st Sess. 5 (1981) *with* H.R. REP. NO. 95-68, 95th Cong., 1st Sess. 25 (1977). In the case of preferential hiring of local nationals, it cannot be said, as it was in *Dames & Moore*, that there is "a systematic, unbroken executive practice, long pursued to the knowledge of Congress and *never before questioned*. . . ." *Id.* at 4978 (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 610-11 (Frankfurter, J., concurring) (1952) (emphasis added)).

[55] Rovine, *supra* note 22, at 421. While Congress could simply refuse to appropriate funds for this purpose (*See United States* v. *Will*, 449 U.S. 200, 222 (1980) and H.R. 4995, 97th Cong., 1st Sess. (Dec. 4, 1981)), in this case it chose a less abrupt means of reiterating the policy of the Hughes-Schweiker Amendment. In effect a joint resolution, the amendment to the military appropriations bill for FY 1982 was a recognized method of disput-

In this case, Congress invalidated the existing agreements for domestic law purposes in 1971 [56] and has been since urging the Executive to renegotiate each of the international obligations involved. [57] While Congress has never retreated from or reconsidered the underlying prohibition of the practice, and the General Accounting Office and Court of Appeals have joined in this view, the Execu-

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ing the President's authority to continue the practice of local national preferential treatment. *But see* Rovine, *supra* note 22, at 421; Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 YALE L.J. 345, 377 (1955).

[56] "[A treaty as well as an executive agreement] ceases to be binding domestically when a contrary statute is enacted." McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181, 346 (1945). While the Government attempts to characterize base hiring as having "no domestic impact," (Pet. Brief at 23) employment practices of the U.S. Government are obviously "domestic" in nature no matter where theyoccur. The domestic nature of a matter is coterminous with the power of Congress to legislate. HENKIN, *supra* note 22, at 179. *See Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 389-90 (1948), *rehearing denied*, 336 U.S. 928 (1949).

[57] The basic principle in this area has been described as follows:

> As good faith requires, when it becomes necessary or appropriate because of the enactment of contrary legislation to terminate an executive agreement . . . the traditional practice has been to resort to negotiation with the co-contractor State.

Mathews, *supra* note 55, at 348.

Congress has now repeatedly directed that such negotiations commence and has consistently been put off by false reports from the Executive Branch that all needed adjustments would be concluded shortly. *See* Brief in Opposition to Petition, Appendix A at 2a. The Department of the Navy similarly represented to Senator Jackson in 1977 that "the finalized treaty will require ratification by the Senate [and] . . . should resolve the question as to whether preferential employment of Filippinos is to continue." Letter from William Price to Senator Henry M. Jackson (April 1, 1977), referenced as Attachment Five to Plaintiff's Opposition to Motion for Partial Summary Judgment, A.98.

tive Branch has neither renegotiated these provisions nor submitted them to the Senate for approval.

This Court should consider this history of Executive Branch and Congressional interaction in the context of Justice Jackson's observation in his concurrence in *Youngstown Sheet & Tube Co.* v. *Sawyer:* "when the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."[58]

II. The Normal And Plain Meaning Of The Term "Treaty" In The United States Refers Solely To Constitutionally Approved Agreements.

Where a statutory term has a settled and well-known meaning, this Court has presumed that Congress used the term according to that settled meaning. *See Perrin* v. *United States*, 444 U.S. 37, 42 (1979); *Andrus* v. *Sierra Club*, 442 U.S. 347, 356 (1979); *Chandler* v. *Roudebush*, 425 U.S. 840, 848 (1976); *Burns* v. *Alcala*, 420 U.S. 575, 580-81 (1975); *Bradley* v. *United States*, 410 U.S. 605, 609 (1973); *Banks* v. *Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 465 (1968). In this case, the term "treaty" has an established meaning in the United States, and this Court should:

> adhere to the familiar rule that where words are employed in an act which had at the time a well known meaning in the law, they are used in that sense unless the context requires the contrary.[59]

The distinction repeated throughout the Petitioner's Brief between article II treaties and so-called "non-article II treaties" is a wholly fictitious one. The legal and constitutional histories of this nation reveal no such distinction between categories of treaty.

Article II, section 2 of the Constitution of the United States provides that the President "shall have Power, by and with the Advice and Consent of the Senate to make treaties. . . ." A treaty in the United States is, by definition, a creation of article II, section 2,

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[58] 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

[59] *Case* v. *Los Angeles Lumber Products Co.*, 308 U.S. 106, 115 (1939).

clause 2 of the United States Constitution.[60] The Executive Branch has always maintained this traditional definition of "treaty" in its internal procedures as well as in its relations with Congress. In turn, Congress has consistently made a distinction between "treaties" and "other international agreements."[61] Finally, scholars and international law experts have widely acknowledged that the term "treaty" in the context of any dealings with our government has a clear meaning derived from the United States Constitution.[62] There are no "treaties" in the United States other than those concluded pursuant to article II.[63]

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[60] Where the normal meaning of the term "treaty" would frustrate the intent of Congress, the courts have occasionally opted for a more generic or loose view of the term. *See, e.g., B. Altman & Co.* v. *United States*, 224 U.S. 583, 600-01 (1912) ("the purpose of Congress was manifestly to permit rights and obligations of that character to be passed upon in the Federal Court"); *Hughes Aircraft Co.* v. *United States*, 534 F.2d 889, 903 n.17 (Ct. Cl. 1976) (the reason for excluding treaties from the court's jurisdiction "is equally applicable to both forms of international compact"). See Court of Appeals opinion, Pet. App. 8a. *Cf. Four Packages of Cut Diamonds* v. *United States*, 256 F. 305, 306 (2d Cir. 1919), holding that postal "conventions are not treaties, because [they are] not made by and with the advice and consent of the Senate. . . ." *Accord, Williams* v. *Blount*, 314 F. Supp. 1356, 1362 (D.D.C. 1970).

[61] We observed above that the 92d Congress in particular used the term "treaty" in its normal constitutional sense. *See* pages 15-20 *supra*. Other examples are too numerous to fully catalogue. *See* note 75 *infra*.

[62] "For purposes of international law, there is no distinction between treaties and executive agreements. *This has no effect, however, on domestic law distinctions between the two forms. Those distinctions remain legally valid United States law.*" Rovine, *supra* note 22, at 402 (emphasis added). This distinction has been described as one of "international notoriety." McNair, The Law of Treaties 63 (1961).

[63] A departure from this normal meaning may occasionally be necessary in order to avoid an inequitable or nonsensical result. *See Altman*, 224 U.S. at 600-01; *Hughes Aircraft*, 534 F.2d at 903. The literal meaning of terms may be disregarded if there is brought "about an end completely at variance with the purpose of the statute." *United States* v. *Public Utils. Comm'n*, 345 U.S. 295, 315 (1953). *See also Helvering* v. *Hammel*, 311 U.S. 504, 510-11 (1941).

A. *Customary Usage Of "Treaty" By The Executive Branch Has Always Been Focused On Article II Agreements.*

In 1975, the State Department, referring to the Hughes-Schweiker Amendment in the specific context of the Base Labor Agreement at issue in this case, noted:

> The use of the term "treaty" in the United States is usually given a more defined meaning. As you are aware, Article II of the Constitution of the United States (Section 2, Clause 2) provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur. . . ." Therefore, *in the United States the term "treaty" is normally used to indicate an international agreement that is to be or has been brought into force with respect to the United States by and with the advice and consent of the Senate* in conformity with Article II of the Constitution. An international agreement brought into force with respect to the United States in any other manner is usually referred to as an "executive agreement", *see* 14 Whiteman, Digest of International Law 1, or simply as an "international agreement," *see Restatement of the Foreign Relations Law of the United States, Second*, Section 117 *et seq.* (1965) and Henkin, *Foreign Affairs and the Constitution* 173 (1972).[44]

Even when the State Department modified its opinion on the lawfulness of the BLA in 1977, it continued to recognize the normal, accepted meaning of the term "treaty":

> In the United States, the term "treaty" has come to have a more specific meaning. Article II, Section 2, Clause 2 of the Constitution provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur. . . ." *In the United States, the term "treaty" is therefore most frequently used to indicate an international agreement brought into force with respect to the United States in conformity with these provisions of Article II.* An international agreement brought into force with respect to the United States in any other manner is usually referred to as an "executive agreement." Thus, in this sense the

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[44] A.222 (emphasis added).

Base Labor Agreement is an executive agreement rather than a treaty. [65]

In fact, since 1953, the State Department has maintained written procedures for determining whether an agreement is to be concluded as a treaty or as an executive agreement. [66] These procedures, now contained in Circular No. 175, specify detailed criteria as to when executive agreements should be utilized in lieu of treaties. [67] It is inconceivable that this customary usage of treaty vis-a-vis executive agreement by the principal administrative agency charged with foreign relations was not well-known to the members of the 92d Congress. [68]

Even the Department of Defense has recognized the distinctive meanings of "treaties" and "agreements" in its procedures in effect in

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[65] A.208 (emphasis added).

[66] 11 FOREIGN AFFAIRS MANUAL 720-25 (1969). The original predecessor was Circular No. 25, May 15, 1953, superseded by Circular No. 175, Dec. 13, 1955. *See* Murphy, *supra* note 32, at 237.

[67] *See* Pet. Brief at 33 n.23. The Government's paraphrasing of Circular No. 175 omits the essential purposes of the circular, summarized by Executive Branch witnesses in 1972, to be "an acknowledgment that the types of executive agreements enumerated are to be distinguished from treaties" and to provide "guidance . . . [for] everyone as to what should be accomplished by treaty or what should be accomplished by executive agreement." *Congressional Oversight of Executive Agreements: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92nd Cong., 2d Sess. 326-27 (1972) (Testimony of Ralph Erickson, Asst. Attorney General, Office of Legal Counsel, Dep't of Justice).

[68] *See* note 67 *supra*. Indeed, the main role of Congress in this area has been to lament the Executive Branch's circumvention of the treaty process: "over the years the Executive Branch has deviated from the treaty formula and procedure, submitting instead executive agreements that truthfully should have been treaties." *Congressional Review of International Agreements: Hearings Before the Subcomm. on International Security and Scientific Affairs, House Comm. on International Relations*, 94th Cong., 2d Sess. 122 (1976) (Statement of Rep. Zablocki). The Government seems to respond more to the merits of this Congressional criticism than to the issue before the Court: that a distinction between "treaty" and "other international agreements" was intended by Congress. *See* Pet. Brief at 33 n.23.

1971 governing local national hiring. The March 6, 1961 memorandum from the Secretary of Defense referred to in the Congressional debates on the Hughes-Schweiker Amendment,[69] stated:

> The Military Departments will . . . [c]onsistent with *status-of-forces agreements, country to country agreements, and treaties*, make the maximum feasible reduction in the number of local national employees of non-appropriated fund activities. . . .[70]

Department of Defense Instruction No. 1400.23, September 18, 1974, as amended, encouraged hiring of dependents "unless precluded by *treaties or other agreements* which provide for preferential treatment for local nationals."[71]

It was only after enactment of the Hughes-Schweiker Amendment, and then only for limited purposes, that the distinction between "article II treaties" and "non-article II treaties" began to be used by the Executive Branch. The Government's coining of a new extra-constitutional entity in order to bolster its position in this case should be disregarded. As this Court has stated:

> the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.[72]

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[69] A. 202, 117 CONG. REC. 16133 (1971).

[70] Memorandum from Deputy Secretary of Defense Roswell Gilpatrick to: the Secretaries of the Army, Navy, and Air Force; the Chairman of Joint Chiefs of Staff; and the Asst. Secretaries of Defense (March 6, 1961) (emphasis added). This Court should take judicial notice of DOD circulars and policy statements. *NLRB* v. *E.C. Atkins & Co.*, 331 U.S. 398, 406 n.2 (1947).

[71] "Employment of Dependents of Military and Civilian Personnel Stationed in Foreign Areas," Department of Defense Instruction 1400.23, Sept. 18, 1974, as amended April 16, 1976.

[72] *Chandler* v. *Roudebush*, 425 U.S. 840, 848 (1976) (citing *Lynch* v. *Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925)).

B. *Congress Has Consistently Distinguished Between "Treaties" and "Other International Agreements"*

The terms "treaty" and "other international agreement" have been widely used in legislation and have come to have distinct and well-known meanings. The Court of Appeals noted that:

> This distinction between treaties and other forms of international agreements is followed in the draft Restatement of the Foreign Relations Law of the United States. [citation omitted]. *Thus under United States law, "treaties" normally are thought of as one specific category of international agreements requiring a particular procedure and having a particular status.*[73]

Congress has consistently observed this strict distinction. Thus the compilation of international agreements directed by Congress in 1 U.S.C. § 112a (1976) is mandated to be entitled "United States Treaties and Other International Agreements." The statute requiring the State Department to compile these agreements provides that the publication shall be legal evidence of "the treaties, international agreements other than treaties, and proclamations by the President of such treaties and agreements. . . ." *Id.* The addition of other publications admissible as proof of "treaties, international agreements other than treaties, and proclamations by the President of such treaties and

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[73] Pet. App. 6a-7a, 642 F.2d at 556-57. (emphasis added). The draft of the RESTATEMENT cited by the court, correctly summarizes the customary use of the terms:

> § 302. Definitions: Law of the United States
>
> (a) *Treaty* means an international agreement made by the President with the advice and consent of the Senate, two-thirds of the Senators present concurring.
>
> (b) Other international agreements, some times collectively referred to as international agreements other than treaties, include executive agreements pursuant to treaty, Congressional- executive agreements (i.e., executive agreements pursuant to congressional authorization) and sole executive agreements.

RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302 (Tent. Draft April 1, 1980) (emphasis added). *See id.*, Introductory note 3, at 74.

international agreements," 1 U.S.C. § 113, further extends this commonplace distinction. [74]

Numerous more specific federal statutes recognize the distinctive meanings of "treaties" and "other international agreements." One clear example is 22 U.S.C. § 3304, a statute extending our country's commitments to Taiwan despite the Executive Branch's recognition of the People's Republic of China. Section 3304(c) expresses Congressional approval of "the continuation in force of all treaties and other international agreements. . . ."

The Atomic Energy Act defines "international arrangement" to include "any international agreement hereafter approved by Congress or any treaty. . . ." 42 U.S.C. § 2014(n) (1976). The Ocean Dumping Act directs international research cooperation "pursuant to international agreements and treaties made by the President with the advice and consent of the Senate. . . ." 33 U.S.C. § 1442(b) (1976). Other statutes reiterate this distinction. [75]

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[74] The Case Act, 1 U.S.C. § 112b, is included in this portion of the U.S. Code and is "for merely informational purposes. . . ." *Dole* v. *Carter*, 444 F. Supp. 1065, 1070 (D. Kan. 1977). Although the Government attempts to make much of the submission under the Case Act of five executive agreements providing local national preferences since 1971 (Pet. Brief at 40-41), it is undisputed that this procedure "is for the information of Congress rather than its approval." Rovine, *supra* note 22, at 401-02. *But see* the expressions of Congressional policy discussed in Section I, Part D, *supra*. Moreover, if these arrangements were "treaties," they would not be submitted to Congress under the Case Act.

[75] *See, e.g.*, 16 U.S.C. § 1532(8) (endangered species protected "by treaty or other international agreement"); 22 U.S.C. § 2660 (referring to copies of treaties ratified by the President); 46 U.S.C. § 391a(8)(C) (foreign certificate of shipping compliance issued under "any treaty, convention, or other international agreement"); 21 U.S.C. § 872(d) (confidentiality of records on drug abuse protected notwithstanding "treaties or other international agreements"); 21 U.S.C. § 852 (drug rehabilitation reserved as alternative to criminal penalties notwithstanding any "treaties or international agreements"); 42 U.S.C. § 242a(b) (confidentiality of mental health records protected notwithstanding any "treaties or international agreements"); 44 U.S.C. § 1511 (excluding "treaties, conventions, protocols,

The Government notes that the Executive Branch may enter into executive agreements which in most contexts could accomplish whatever a treaty can accomplish. [76] The issue here is whether in Section 106 Congress restricted this discretion in the area of local national hiring at U.S. bases to the vehicle of treaties which must, by definition, be approved by two-thirds of the Senate. The historical distinction between "treaties" and "other international agreements" recognized by the Court of Appeals is strong evidence that such was the intent of the Hughes-Schweiker Amendment.

C. *Scholars And International Law Experts Have Historically Considered "Treaty" To Denote An Agreement Approved By The Senate*

Every commentator on American foreign affairs has recognized the distinction between "treaties" and "other agreements" as self-evident.

> By common practice under [our unique constitutional system], the term "treaty" is used to refer to every agreement, whether written or verbal, important or unimportant, with one or more foreign nations which, prior to ratification by the President, receives the consent of two-thirds of the Senate. . . . [77]

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and other international agreements, or proclamations thereof by the President" from *Federal Register* and *Code of Federal Regulations*); 48 U.S.C. § 1574(a) (preserving rights "by virtue of any treaty or international agreement" in granting legislative authority to Virgin Islands); 46 U.S.C. § 481(b)(2) (applying shipping regulations to foreign vessels in U.S. ports "[u]nless otherwise prescribed by treaty or other international agreement. . . .").

[76] *See* Pet. Brief 27-28 & n.17; Court of Appeals decision, Pet. App. 6a & n.11, 642 F.2d 556 & n.11.

[77] McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181, 197 (1945). *Accord*, Murphy, *supra* note 32, at 222 "[T]he term 'treaty' under United States law normally connotes an agreement requiring the ratification of the Senate under article II of the Constitution. . . ." Court of Appeals decision, Pet. App. 8a, 642 F.2d at 557.

The decision in *B. Altman & Co.* v. *United States*, 224 U.S. 583 (1912), is notable principally because it construed the term "treaty" in a sense contrary

See 2 BUTLER, THE TREATY-MAKING POWER OF THE UNITED STATES 370 (1902); CORWIN, THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS 125 (1917); HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 173 (1975 ed.); MATTHEWS, AMERICAN FOREIGN RELATIONS: CONDUCT AND POLICIES 545-46 (1938); MCCLURE, INTERNATIONAL EXECUTIVE AGREEMENTS 331 (1914); SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS 121 (1919).

This Court has frequently and consistently used the term in the constitutional sense without comment or elaboration. *See Dames & Moore* v. *Regan*, 49 U.S.L.W. 4969, 4976 (1981); *Goldwater* v. *Carter*, 444 U.S. 996, 997,999 (1979) (Powell, J., concurring); *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, 765 (1972); *New York Times Co.* v. *United States*, 403 U.S. 713, 727 n.1 (1971); *Mora* v. *McNamara*, 389 U.S. 934, 934 (1967) (Stewart, J., dissenting); *Kolovrat* v. *Oregon*, 366 U.S. 187, 193, 195 (1961); *Perez* v. *Brownell*, 356 U.S. 44, 48-49 (1958); *Reid* v. *Covert*, 354 U.S. 1, 16, 17 n.33 (1957); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936); *Missouri* v. *Holland*, 252 U.S. 416, 432 (1920). In *Reid* v. *Covert*, this Court specifically distinguished between treaties and executive agreements. *See* 354 U.S. at 18 n.33.

The particular meaning of the term "treaty" in the United States is so deeply ingrained in the international community that one writer commented:

> The whole world, or at any rate the treaty-making portion of it, is familiar with that provision.*** Article II, Section 2, of the

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to its normal meaning, in order to fulfill the specific intent of Congress. *See* note 63 *supra*. Professor Borchard characterizes *Altman* as involving "solely the question whether the Supreme Court had jurisdiction over the interpretation of an Act of Congress, analogous to its jurisdiction over treaties." Borchard, *Treaties and Executive Agreements—A Reply*, 54 YALE L.J. 616, 644 (1945). He concluded that "[t]he Court decided to consider the agreement like a treaty, while pointing out that it was not a treaty." *Id*. *See* note 60 *supra*.

> American Constitution is an illustration of a fundamental constitutional provision, and we submit with confidence that provisions of this character must be regarded as possessing international notoriety. . . .[78]

Where a customary and historical meaning has been attached to a term, it should take a major demonstration of legislative intent to depart from such a meaning.[79] Not only is there no indication that Congress intended other than the normal meaning of "treaty" when it enacted Section 106, in this instance there is abundant evidence that it meant *just what the statute says.*[80]

III. The Constitutional Exercise Of Congressional Power Compels That Inconsistent Executive Agreements Be Superseded Without Judicial Review Of The Policies So Affected

As this Court noted in *Dames & Moore* v. *Regan*, "it is doubtless both futile and perhaps dangerous to find any epigrammatical explanation of how this country has been governed."[81] One writer recognized the tension endemic to the constitutional allocation of power in foreign affairs:

> That the Constitution, considered only . . . affirmative grants of powers which are capable of affecting the issue, is an invitation to struggle for the privilege of directing American foreign policy.[82]

Into this struggle, this Court must enter, facing claims of unfettered Executive discretion with a "poverty of really useful and unambiguous authority applicable to concrete problems of executive power

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[78] McNair, The Law of Treaties 63 (1961). Lord McNair goes on to suggest that "other States cannot hold a State bound by a treaty when in fact there has been no compliance with constitutional requirements of this type." *Id. See* Henkin, *supra* note 22, at 137.

[79] *Diamond* v. *Chakrabarty*, 447 U.S. 303, 308 (1980); *Perrin* v. *United States*, 444 U.S. 37, 42 (1979). *See* note 59 *supra* and accompanying text.

[80] *See* Section I *supra*.

[81] 49 U.S.L.W. at 4970.

[82] Corwin, The President: Office and Powers 200 (2d ed. 1941).

as they actually present themselves." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

This case presents a situation where the power of the Executive is "at its lowest ebb" and can be sustained "only by disabling the Congress from acting upon the subject." *Id.* at 637-38. Congress has enacted legislation which was intended to provide "that the Department of Defense cannot discriminate against American citizens or their dependents in employment on military bases."[83] Since 1971, Congress has "urge[d] the Department of Defense to continue the policy of converting foreign national positions to U.S. dependents when feasible and as vacancies occur."[84] Most recently, the Conference Committee on the fiscal year 1982 military appropriations bill "agree[d] that the DOD should take every possible action including renegotiation of existing agreements if necessary in order to enhance the employment opportunities for U.S. citizens living in overseas areas."[85]

Congress possesses Constitutional power to legislate in this area, but is dependent upon the Executive Branch to implement that legislation. Otherwise, Congress is left with little means to make the exercise of its Constitutional prerogative an effective act.[86] The Executive has thus far resisted, as it does before this Court, the execution of a legislative mandate. Upon this Court, therefore, de-

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[83] S. REP. NO. 92-93, 92d Cong., 1st Sess. 23 (1971).

[84] H.R. REP. NO. 95-1398, 95th Cong., 2d Sess. 81 (1978).

[85] H.R. REP. NO. 97-410, 97th Cong., 1st Sess. 59 (1981), *reprinted in* 127 Cong. Rec. H9575 (daily ed. Dec. 15, 1981).

In its most recent efforts, Congress has directed the Executive Branch to provide preferential treatment of *American* citizens, while the Hughes-Schweiker Amendment only prohibited discrimination against them. *See* H.R. 4995, 97th Cong., 1st Sess. amendment No. 100 at 68-69 (Dec. 4, 1981) (which would have terminated funding for any local national hired after April 1, 1982).

[86] The Draconian use of appropriations power is one alternative. *See* note 83 *supra*. However, this does not provide a vehicle for compensating past victims — the real objective of the lawsuit — and future local national preferences could be continued under treaty provisions as deemed necessary by the President and the Senate.

volves the responsibility to ensure that the laws of the United States are effectively honored by the Executive Branch.

A. *Congress Has Acted In An Area Where It Possesses Constitutional Authority.*

The power of Congress in the arena of foreign affairs needs no detailed exposition. "Congress has needed no extravagant, uncommon constitutional interpretations. . . ."[87] Thus, this Court has affirmed the "statutory regulation of labor contracts, even if aliens may be involved, where the incidents regulated occur [in] areas under the control, though not within the territorial jurisdiction or sovereignty of [the United States]." *Vermilya-Brown Co., Inc.* v. *Connell*, 335 U.S. 377, 381 (1948), *rehearing denied*, 336 U.S. 928 (1949). Through the power to create federal offices (article II, section 2), to regulate foreign commerce (article I, section 8, clause 3), and to make appropriations (article I, section 8, clause 1), virtually "any subject of a treaty is probably also within Congressional power. . . ."[88]

There is no disagreement that the subject matter of employment practices at U.S. military facilities overseas lies within the area of shared powers under the Constitutional scheme.[89] It is, therefore, critical to evaluate the effect of the Congressional actions in enacting

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[87] HENKIN, *supra* note 22, at 67. *See* Murphy, *supra* note 32, at 235-36 (concerning Congressional authority over international agreements regarding the stationing of American armed forces abroad).

[88] HENKIN, *supra* note 22, at 159. *See Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 160 (1963). James Wilson observed at the Pennsylvania Convention on ratification of the U.S. Constitution in 1787:

> The President nor the Senate, solely, can complete a treaty; they are checks upon each other, and are so balanced as to produce security to the people." Quoted in S. CRANDALL, TREATIES: THEIR MAKING AND ENFORCEMENT 58 (2d ed. 1916).

[89] *See* Court of Appeals decision, Pet. App. 15a n.30, 642 F.2d at 560 n.30. The Government concedes also that the Base Labor Agreement in the Philippines is a "Congressional-executive agreement" in the sense that it was concluded in 1968 under a Congressional "grant of authority to the President. . . ." Pet. Brief at 27 n.16. *See* 22 U.S.C. § 1392 (1976). *Accord*, Testimony of Professor Bickel, *supra* notes 33 & 43.

the Hughes-Schweiker Amendment and subsequent Congressional pronouncements on the efficacy of local national employment preferences.

B. *Where Congress Has Exercised Its Constitutional Authority, Inconsistent Executive Agreements Are Superseded.*

This Court noted in *Dames & Moore* v. *Regan* that:

> [W]hen the President acts in contravention of the will of Congress, "his power is at its lowest ebb," and the Court can sustain his actions "only by disabling the Congress from acting upon the subject."[90]

As discussed at length above, Congress has forcefully and directly challenged the preferential and discriminatory hiring of local nationals by the Executive Branch. The Court of Appeals below found "an unmistakable indication that Congress intended to abrogate those portions of the existing executive agreements providing for preferential hiring of local nationals."[91]

That the executive agreement must yield to an act of Congress is "the uniform practice."[92] The Legal Advisor to the State Department testified to Congress in 1972 that "[it is] perfectly clear that, in an area of shared presidential and congressional powers, subsequent legislation would override an executive agreement. . . ."[93] Similarly, it is clear that "Congress may prohibit certain types of executive agreements by statute. . . ."[94]

While this Court has not elaborated on the circumstances under which a statute will override an executive agreement, the opinion in

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[90] 49 U.S.L.W. at 4973 (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring)).

[91] Pet. App. 14a, 642 F.2d at 560. *See* Section I, Part B *supra*.

[92] Borchard, *Treaties and Executive Agreements — A Reply*, 54 YALE L.J. 616, 623 (1945). *See* Murphy, *supra* note 32, at 244.

[93] Stevenson Statement, *supra* note 22, at 288-89. *See* Rovine, *supra* note 22, at 421.

[94] Rovine, *supra* note 22, at 423.

Reid v. *Covert*, 354 U.S. 15, 17 n.33 & 18 (1957) provides some *dictum* on the subject:

> [W]hen a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null. . . . We recognize that executive agreements are involved here but it cannot be contended that such an agreement rises to greater stature than a treaty. [95]

The circumstances under which this Court has found that a treaty is superseded by a statute warrant review. In perhaps the seminal case on the subject, this Court held that the generally phrased Internal Revenue Act of 1869 superseded the 1866 treaty with the Cherokee Nation, even through the statute did not refer expressly to the treaty. *The Cherokee Tobacco*, 78 U.S (11 Wall.) 616 (1871). The Court's opinion is instructive:

> The language of the section [of the statute] is as clear and explicit as could be employed. It embraces indisputably the Indian territories. Congress not having thought proper to exclude them, it is not for this court to make the exception. There being no ambiguity, there is no room for construction. It would be out of place. The section must be held to mean what the language imports.
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> In the case under consideration the act of Congress must prevail as if the treaty were not an element to be considered. *Id.* at 620-21. [96]

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[95] *Cf. United States* v. *Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 206 (1955) (agreement subsequent in time to inconsistent statute must yield to statute).

[96] The dissent in *Cherokee Tobacco* sounds remarkably similar to the position urged now by the Government:

> An express law creating certain special rights and privileges is held never to be repealed by implication by any subsequent law couched in general terms, nor by any express repeal of all laws inconsistent with such general law, unless the language be such as clearly to indicate the intention of the legislature to effect such repeal. (Bradley and Davis, J.J., dissenting) 78 U.S. (11 Wall.) at 622.

The decision in *Chae Chan Ping* v. *United States*, 130 U.S. 581, 602 (1889) addressed a similar indirect abrogation by noting:

> [I]f congress has this power it is wholly immaterial to inquire whether it has, by the statute complained of, departed from the treaty or not; or, if it has, whether such departure was accidental or designed; and, if the latter, whether the reasons therefor were good or bad.[97]

Similarly, in *Sanchez* v. *United States*, 216 U.S. 167, 175-76 (1910), this Court noted that *even if* "Congress did not . . . intend by the Foraker act to modify the treaty . . . if that act were deemed inconsistent with the treaty, the act would prevail. . . ."

The Government in this case apparently confuses "repeals by implication" (Pet. Brief at 25) with the primacy of a subsequent statute over an inconsistent treaty. Professor Henkin more aptly summarized the relationship presented by this case:

> [A]cts of Congress inconsistent with earlier treaty obligations are regularly given effect by the courts. That is not to say, as is often erroneously said, that Congress can "repeal" a treaty: Congress is not acting upon the treaty, but, exercising one of its legislative powers, it legislates without regard to the international obligations of the United States.[98]

Thus, the key is not the articulation of "intent to repeal" (Pet. Brief at 25-27), but whether the statute is "clearly inconsistent" with the treaty. *United States* v. *McBratney*, 104 U.S. 621, 623 (1882).[99]

Congress has exercised its legislative powers to end the preferential treatment of local nationals at U.S. military facilities overseas. As we noted in Section I, Part A, it is impossible to effectuate this result

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[97] *See also Whitney* v. *Robertson*, 124 U.S. 190, 195 (1888); *United States* v. *McBratney*, 104 U.S. 621, 623 (1882); *Edye* v. *Robertson*, 112 U.S. 580, 597-98 (1884).

[98] HENKIN, *supra* note 22, at 164.

[99] *See National Ass'n of Property Owners* v. *United States*, 449 F. Supp. 1223, 1251 (D. Minn. 1980) (noting that Boundary Waters Canoe Area Wilderness Act of 1978 would prevail over inconsistent provision of Webster-Asburton Treaty of 1842); *Akins* v. *United States*, 551 F.2d 1222, 1229-30 (C.C.P.A. 1977).

without abrogating existing executive agreements which remain the sole means of perpetuating such discriminatory practices. The statutory provision is "clearly inconsistent" with these "diplomatic arrangements" [100] and should be given effect even if Congress had expressed no apparent intent to abrogate the agreements. [101]

C. *Foreign Policy Arguments Stemming From The Exercise Of Congressional Authority Are Not Appropriately Addressed To This Court.*

As this Court stated long ago in *Chae Chan Ping* v. *United States*, 130 U.S. 581, 602 (1889), once Congress has acted within its constitutional authority in this area "it is wholly immaterial . . . whether the reasons therefor were good or bad." The question before the Court is whether Congress sought narrowly to grant exceptions to the proscription against discrimination provided by the Hughes-Schweiker Amendment. If such a narrow exception for treaty provisions was intended, then inconsistent unilateral Executive Branch actions must be set aside [102] without consideration of the purported foreign policy consequences hypothesized by the Government.

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[100] U.S. General Accounting Office, "Department of Defense Should Change Pay Setting for Filipino Nationals," FPCD 77-70 (Oct. 5, 1977) (referring to the Base Labor Agreement). *See* A.204.

[101] Motive is similarly irrelevant. *See Chae Chan Ping* v. *United States*, 130 U.S. 581, 602-03 (1889). In *Diggs* v. *Shultz*, 470 F.2d 461, 465-66 (D.C. Cir. 1972), Judge McGowan referred to "the constitutional power of Congress to set treaty obligations at naught." He further noted the purpose of the Byrd Amendment (permitting the purchase of chrome from Rhodesia in violation of United Nations sanctions) was "in blatant disregard of our treaty undertakings" but concluded that "Congress can denounce treaties if it sees fit to do so. . . ." *See Sneaker Circus, Inc.* v. *Carter*, 457 F.Supp. 771, 795 (E.D.N.Y. 1978).

[102] "If the country with which the treaty is made is dissatisfied with the action of the legislative department, it may present its complaint to the executive. . . . The courts can afford no redress. Whether the complaining nation has just cause of complaint, or our country was justified in its legislation, are not matters for judicial cognizance." *Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888). *See Diggs* v. *Shultz*, 470 F.2d 461, 466 (D.C. Cir. 1972).

This potentially harsh rule is, of course, significantly mitigated by the facts in this case. No treaty is being abrogated by the Hughes-Schweiker Amendment, but rather executive agreements. If the host nation, including the Republic of the Philippines, should request the continuation of local national hiring preferences as a *quid pro quo* for the location of U.S. bases there, the Executive Branch may simply submit the arrangement to the Senate for approval. *See* Brief in Opposition to Petition at 6-8. Exactly this procedure was contemplated in 1977, but not followed. *Id.*

Since any current hiring practices could continue if approved by the Senate as treaties, the allegations that the treaty process is "*time consuming*" and "*reduces negotiating flexibility*" are the only colorable policy considerations presented in the Petitioner's Brief. Pet. Brief at 31 n.21 (emphasis added). The factual support for these contentions is, of course, absent in this record. [103] Further, it is clear that the weight to be assigned to such representations is more effectively and appropriately determined by Congress.

Finally, that Congress on December 15, 1981 called on the Executive branch to "take every possible action including renegotiation of existing agreements if necessary in order to enhance the employment

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[103] There are no findings of fact by the District Court which would support any of these allegations. The Government in the District Court argued that "it would be improper for this Court to serve as a forum for foreign policy debate." Opposition to Plaintiffs' Motion for Issuance of Letters Rogatory at 2 (Feb. 28, 1979). The Government added that "*the foreign policy prognostications of the United States Government are not subject to judicial inquiry.*" *Id.* (emphasis added). The Government thus objected to producing documents on the negotiations with the Republic of the Philippines concerning the maintenance of U.S. military bases in the Philippines and the terms and conditions of U.S. maintenance of such bases, citing the request as "irrelevant." Defendants' Objections to Plaintiffs' Document Requests at 1 (Feb. 5, 1979). The Government further objected to depositions of State Department witnesses on the grounds that the legality of the BLA "is a purely legal issue. . . ." Memorandum In Support of Motion to Quash at 1 (Feb. 12, 1979).

opportunities for U.S. citizens living in overseas areas,"[104] suggests that the weight given by Congress to these supposed foreign policy consequences has been slight.[105]

In any event, the best advice provided to date on this subject may have come from the Assistant Legal Advisor for Treaty Affairs of the State Department, writing in 1977:

> Whether the question is the desirability of a particular agreement, or whether it should be concluded as a treaty or executive agreement, or what kind of implementation is necessary or desirable, the most appropriate avenue to an efficient and yet politically responsive method of international agreement making, like all areas of foreign policy, is close communication between the two branches.[106]

Accordingly, this Court should avoid being drawn into the factual merits of a dispute between the other branches of Government. Congress has clearly addressed an issue over which it has constitutional authority and its will should not be frustrated by unsubstantiated and inappropriate policy arguments.

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[104] H.R. REP. NO. 97-410, 97th Cong., 1st Sess. 54 (1981), *reprinted in* 127 CONG. REC. H9575 (daily ed. Dec. 15, 1981).

[105] Congress has routinely conducted hearings on local national manpower issues. *See, e.g., Department of Defense Appropriations for 1981: Hearings Before the Subcomm. of the House Comm. on Appropriations*, 96th Cong., 2d Sess. Part 5 (1980).

[106] Rovine, *supra* note 22, at 431. Indeed, the State Department promised to cooperate with Congress "whenever there is a serious question whether an international agreement is to be made in the form of a treaty or otherwise." *Congressional Oversight of Executive Agreements: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 2d. Sess. 251 (1972) (letter from David M. Abshire, Asst. Sec. of State for Congressional Relations).

CONCLUSION

The hardships on our U.S. servicemen and their families stationed at facilities all over the world have not lessened in the ten years since Congress enacted the Hughes-Schweiker Amendment. The financial strain on families in this situation has probably increased. The Congressional policy of encouraging the employment of U.S. citizens and their dependents was intended "to correct [this] situation," but the Department of Defense has resisted the will of Congress and the purpose of the legislation.

There is no doubt that Congress has the Constitutional authority to exercise a role in setting the terms and conditions of employment at U.S. bases overseas. Similarly, when the full context of Congressional action on the Hughes-Schweiker Amendment is considered, there is no doubt that Congress intended the exceptions to its rule against discrimination to be narrowly defined. Any other result would nullify the statute and frustrate the intent of Congress.

This Court should affirm the Court of Appeals decision and mandate that the spirit and letter of this law finally be honored.

Respectfully submitted,

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January 11, 1982